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CASE & COMMENT

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS
INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED
LEGAL NEWS NOTES AND FACETIÆ

VOL. 3 MAY, 1897 NO. 12

CASE AND COMMENT

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THE LAWYERS' CO-OPERATIVE PUB. CO.,
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Richard Olney.

A world-wide reputation as a statesman, which is usually the product of many years of public life, has been made by Richard Olney in two years. It is only four years since he left private practice to make his first appearance in national affairs.

Mr. Olney is a direct descendant both from the Puritans and the Huguenots. Thomas Olney, a Puritan, came to Salem from St. Albans, Hartford county, in 1635, but in 1637 accompanied Roger Williams to his settlement at Providence plantations. His descendant, Richard, grandfather of the present Richard, established cotton mills in Worcester county, Massachusetts, in 1811. Wilson Olney, son of Richard, was a woolen manufacturer and banker. His wife, Eliza L. Butler, was a descendant of Andrew Sigourney, a French Huguenot who fled from France at the revocation of the edict of Nantes.

Richard Olney was born September 15, 1835, at Oxford, Massachusetts, and after studying at Leicester academy went to Brown University, from which he graduated with high honors in 1856. He took the degree of Bachelor of Laws from Harvard Law School in 1858. In April, 1859, he was admitted to the bar of the supreme judicial court in Suffolk county, Massachusetts, and entered the office of Judge Benjamin F. Thomas, whose daughter he married in 1861 and with whom for twenty years and as long as Judge Thomas lived he continued to be closely associated in the practice of his profession.

The law practice of Mr. Olney has been mainly in two lines, the law of corporations, and the law of wills and estates. In later years he has been engaged as counselor or adviser more than in litigation. But in the earlier years of his practice he was well known in the courts as an advocate and trial lawyer. Once when assigned to defend a man charged with murder in the first degree he secured an acquittal, although for fifty years such acquittals at the Suffolk bar have been rare. As a speaker his voice and enunciation are unusually pleasing and his diction pure. His vigorous argument, with its condensation of facts, simple arrangement, plain statement, and close logic, is very effective.

Politics and official life have had little temptation for Mr. Olney, although he served one year in the state legislature, and in 1876 he was the Democratic candidate for attorney general of Massachusetts. He has several times declined the proposal of a seat in the supreme judicial court of the state. He has been independent in his politics and refused to support Benjamin F. Butler when the latter controlled the Massachusetts democracy. In the Cleveland Campaign of 1892 Mr. Olney presided at the first Boston rally.

When President Cleveland entered on his second administration Mr. Olney became Attorney General. His large statesmanlike views and conspicuous ability were quickly brought

into exercise in that office by the Debs Case, the Income Tax Case, and others which called him to argue great questions of immense importance to the nation. But he turned from merely national to international interests when, upon the death of Secretary Gresham, he was appointed Secretary of State. He took the oath of office June 10, 1895, and in less than two years made himself a large place in history. Few secretaries of state have dealt with matters of so much moment or handled them so successfully. His negotiation of the Venezuelan treaty and the treaty of general arbitration with England was a work of the largest statesmanship, which is none the less conspicuous because of the opposition which prevented the ratification of the latter treaty. Mr. Olney's part was well done, and his fame is secure.

An Ideal Judge.

The peculiar respect which men always feel for a judge, and which grows into a fine homage if he fills their ideal, is illustrated once more in the tributes paid to the late Francis Alexander Fitzgerald, who from 1859 to 1882 was one of the barons of the Irish Court of Exchequer. The Lord Chief Baron of Ireland, Right Honorable Christopher Palles, calls him "a model type of the judicial character," and The London Law Times says he was "the ideal judge."

Notwithstanding a brilliant career at the university, his eminence at the bar did not begin until after years of obscurity. Even while he was a briefless barrister he is said actually to have returned a brief which came to him because he suspected it had been procured for him by the favor of friendship. But when work began to come it came in great quantity. When elevated to the bench he is said to have been the only Irish judge who had not been an active politician. Although judgeships were usually given to reward political services, his undisputed preëminence compelled his appointment.

On the bench he went to the extreme of caution in guarding himself against bias. He avoided the public boards to which Irish judges were often appointed, and every other position or relation in which he might feel the influence of passion, prejudice, or politics. He accepted no favors from the Crown, either for himself or his relatives. The only charge of unfairness that could be brought against him was that his excessive fear of favoring a near relative who was at the bar really biased him against that gentleman. But he would not hold assizes in the circuit of which that relative was a member.

The promotion to be Lord Chief Justice of Ireland was offered Baron Fitzgerald some years before his retirement, but he declined it, partly, it is said, because he did not wish to preside at criminal trials. He had previously declined an appointment as Master of the Rolls and another as Lord Justice of Appeal, and also firmly rejected a suggestion of his appointment as Lord Chancellor of Ireland. He held that there should be no promotion for occupancy of the bench. He resigned his office when the Coercion Act of 1882 was passed, with a provision by which he might in some cases be called upon to try prisoners without a jury.

"The London Law Times," from which the facts of this sketch are taken, declares that his fifteen years of retirement were years of enormous mental activity, and says: "He was not only a great lawyer, but a great metaphysician and theologian, and he was enabled, surrounded by devoted friends, to gratify his simple, single-minded, studious tastes. For kindness, sympathy, amiability, and desire to befriend young men struggling at the bar, Mr. Baron Fitzgerald's memory will be greatly treasured, while his career will be remembered as one which for sixty-three years reflected lustcr on the bar of Ireland."

A Lesson from Russia.

The suggestion that a needed lesson of great value may be learned by the United States from the Russian convict system may be a startling one to many of us who have been taught to think of Russian penology as organized diabolism. But, as we learn from the "Chicago Legal Adviser," Dr. Benjamin Howard, after many years special study of penology and repeated visits to Russia and Siberia, in the last of which he has been through every prison for convicts and exiles between St. Petersburg and Siberia, has reached the conclusion that "in its main principle of productive labor the Russian penal system is worthy of imitation," although he adds that "in its general mal-administration it is worthy of reprobation." After showing that Russian convicts, instead of being a heavy charge on the resources of the country, are a source of revenue, that they have added to the empire an island the length of England, and

have made the Trans Siberian railway possible, he says: "By the means employed in Siberia the convicts do not lose self-respect, and are often better fitted than before to become useful members of society. In the English and some other prison systems the outcome is generally the opposite."

Possibly the system of exile and colonization, permitting much freedom, may make it possible to get better results than can be secured in prisons. Yet even in prisons there is room to apply what Dr. Howard calls the first principle, "that of self maintenance," and to practice what he calls the main lesson to be drawn from the Russian system,—"the absolute futility of punishment for its sake alone." While these ideas are not new in America, they are too much ignored in practice, and detailed results of Russian experience may possibly give us a much-needed lesson.

Cutting off Actions against Stockholders of Foreign Corporations.

The exceptional interest in the subject of remedies against stockholders in foreign corporations which has been indicated by inquiries for the article on the subject in the March number of "Case and Comment" justifies a reference to the late New Jersey statute, passed on March 30, 1897. It declares that no creditor of any corporation shall enforce, by any pending or future action, against stockholders, officers, or directors in any court of that state, any liability created by the laws of any other state or country, except by an equitable accounting for the proportionate benefit of all parties interested to which the corporation, its legal representatives, if any, all its creditors, and all its stockholders shall be necessary parties.

People usually suspect that a statute which defeats pending actions is a special act of favoritism in the guise of a general law. But in this case the subject of the law is plainly a matter for which general legislation is proper, and if the provisions of the law are just, it is not unreasonable to make it apply to pending actions.

The remedy saved by statute is the proper one when it is practicable. But the necessity of making the corporation itself, its legal representatives, all of its creditors, and all of its stockholders parties to the suit will in many cases make the remedy entirely impracticable, and thus enable residents of New Jersey, who have as corporators sought advantages under the laws of other states, to repudiate all liabilities incurred by them under those laws. New Jersey stockholders will thus evade their creditors and also throw upon their fellow stockholders in other states all the burdens of their unsuccessful undertakings. This is not just nor honorable. Of course, the statute cannot affect a creditor's remedy, if he has any, in a Federal court, but many cases cannot be brought in such a court, either because the claim is too small, or because the parties are citizens of the same state.

The result is that the statute increases the unfortunate confusion of the laws on this subject, and may amount in many cases to a substantial repudiation of the liability of New Jersey stockholders in foreign corporations.

Aggravated Confiscation.

Sheer confiscation of property is sometimes made by exorbitant assessments for alleged benefits of local improvements. In such a case the owner may be remediless because the question of fact as to the amount of benefits has been found against him by a tribunal acting under legal rules. But the very climax of injustice and outrage is reached when the owner of premises has to submit, not only to their confiscation and sale to pay for so-called benefits to them, but to be made personally liable to complete the payment of the assessment after it has swallowed the entire premises "benefited" and still remains unsatisfied. This is more than the confiscation of property. It confiscates one's premises and then fines him for his former ownership. Yet this has been held constitutional. In a recent case more than a mile of street leading to a fair ground was paved against the opposition of all the property owners on both sides, and, as they allege, at the instance of the directors of the fair grounds. Yet the court held that an assessment could be sustained "regardless of the fact of whether or not it is a benefit to the abutting property," and that a decree might direct a general execution against the owner of an abutting lot for any balance of the assessment that might remain after exhausting the specific property on special execution. (Dewey *v.* Des Moines (Iowa) 70 N. W. 605.) The contention that this was a deprivation of property without due process of law was rejected on the authority of Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616, in which the Supreme Court of the United States,

speaking through Mr. Justice Miller, said, in respect to a personal judgment on an assessment for alleged benefits: "We are unable to see that any provisions of the Federal Constitution authorize us to reverse the judgment of a state court on that question. It is not one which is involved in the phrase 'due process of law' and none other is called to our attention in the present case."

In many other cases personal actions to enforce such assessments have been sustained, although this has usually been done without much, if any, consideration of the constitutional question. In most cases, at least, courts seem to have thought of the matter only as a mode of collection, without supposing that the assessment would ever be more than the value of the property assessed.

A protest against the decisions of such courts as these may seem hopeless. Yet the greatest respect for the many judges who have rendered these decisions cannot overcome the conviction that the decisions are wrong and dangerous, and that they ought to be reconsidered and overruled. It seems almost impossible to suppose that on full consideration either of these courts would deliberately hold, not only that a man's house might be taken without any compensation whatever for the cost of paving a street in front of it, but that he might be compelled to pay any deficit in the assessments out of his personal earnings as a penalty for having once owned a home. The constitutionality of a statute authorizing such personal liability is said to be "extremely doubtful," in the recent case of Ivanhoe *v.* Enterprise (Or.) 35 L. R. A. 58, and it is expressly denied by some of the authorities cited in the annotation to that case, among which is Raleigh *v.* Peace (N. C.) 17 L. R. A. 330.

The protection of the citizen ought to be found, either in the constitutional provision against taking private property for public use without just compensation, or in that against deprivation of property without due process of law. With very rare exceptions, the authorities on the point (which may be found collated in a note to *Re* Madera Irrigation Dist. (Cal.) 14 L. R. A. 755), agree that special assessments for local improvements depend for their validity on the assumption that the property is benefited to an equal amount. That theory is utterly inapplicable to a personal liability for a deficit in the assessment after the entire property has been absorbed in partially paying it. While exorbitant assessments may result from a mistake in applying a just principle, the imposition of a personal liability for a deficit is arbitrary, and can be based on no principle of right. It is based, instead, upon the assumption that the assessments are so extortionate as to exceed the entire value of the property, else there would be no need of any personal liability. More grotesque injustice cannot be conceived than to fine a man in the name of justice because property of which he has been literally robbed through forms of law is not valuable enough to satisfy those who take it from him.

The case of Davidson *v.* New Orleans, *supra*, on which the Iowa court very naturally rests its decision, treats the matter in a very unsatisfactory way. A single brief paragraph at the end of an opinion dealing with other points merely announces the conclusion. The possibility of a deficit in the assessment after applying the entire value of the property upon it was not mentioned. The truth is that in that very case the court clearly declares a principle under which such a personal liability for a deficit cannot be upheld. The court emphatically denies that a state can make anything due process of law merely by choosing to declare it such, and says that a statute which merely took the title to property from one man and vested it in another would not be due process of law. Yet such a statute would be no more despotic than one which authorizes a personal liability to be imposed on the owner of property for a deficit in an assessment for supposed benefits. Since the whole theory of benefits applies only to the property benefited, there is an utter lack of foundation for the imposition of a personal liability upon the owner. To impose it is a glaring violation of constitutional guaranties, and the principles of justice on which they are founded.

The Digest Infringement Case.

There may be enough interest in the infringement suit against Volume VII. of the General Digest to justify a mention of the matter in this place. The suit was brought in 1892, charging an infringement of the copyright in the headnotes of the West Publishing Company's reporters. On the finding of a master about 300 paragraphs out of about 38,000 were held by the circuit court to infringe copyright, and an injunction was granted against their use. Recently the circuit court of appeals has reversed that decision and extended the injunction to the entire volume until further

proof is given to segregate the offending portion.

The opinion of the court finds that there are numerous paragraphs which infringe copyright, and that the proof fails to show which of the persons engaged on the work made the infringing paragraphs. In notes appended to the opinion the court especially points out the work done from several pamphlet reporters published by the plaintiff. All of these were in fact digested by one man, who was employed only for temporary help and did his work in another state. Even the plaintiff's own exhibits of alleged infringements, the last of which was made after many months of searching and which naturally included many paragraphs which no one but an interested party would ever think of calling an infringement, included almost nothing except the work of this man, that of another man also engaged at a distance for a short time only, and that of one man who was regularly engaged at that time on the General Digest, but who afterwards entered the plaintiff's employment at St. Paul, attempting to conceal that fact from his previous employer.

For the present Volume VII. is subject to an injunction, but the suit is not yet ended.

The West Company's announcement that this is "a test case" makes it pertinent to state that the case relates only to Volume VII. of the General Digest (Old Series). The work on this was done between September 1, 1891, and September 1, 1892. This has been followed by nearly five years of digest work, against which the West Company has brought no suit and will never bring any.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 35, Parts 1 and 2.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with Case and Comment for one year for $1.

Among the New Decisions.

Banks.

A statute making it a crime for an insolvent banker to receive deposits is sustained in Meadowcroft *v.* People, 163 Ill. 56, 35 L. R. A. 176, against the contention that it deprives a banker of liberty or property without due process of law, and that the legislature cannot make the doing of certain acts prima facie proof of guilt.

Bills and Notes.

A promissory note signed by a person who is *non compos mentis*, though negotiable in form, is held, in Hosler *v.* Beard (Ohio) 35 L. R. A. 161, to be subject to the same defenses when in the hands of a bona fide holder that it was subject to in the hands of the payee.

Bonds.

Holding over pending the election of a successor is held, in Baker City *v.* Murphy (Or.) 35 L. R. A. 88, to be as much a part of the term of office as that which precedes it, so as to bring a defalcation during the time of such holding over within the terms of the officer's bond.

Building and Loan Associations.

Cumulation of fines for each additional month of a default is held, in Du Puy *v.* Eastern B. & L. Asso. (Va.) 35 L. R. A. 215, to be unlawful where the by-laws provide for fines of 20 cents per month on each $100 borrowed, in case of default, and it is held that if the by-laws do not impose as great a fine as the charter authorizes, the by-laws will control the amount.

A fixed premium, or a premium required by a by-law to be not more than 30 per cent nor less than 29¾ per cent, is held, in McCauley *v.* Workingman's B. & S. Asso. (Tenn.) 35 L. R. A. 244, to be unlawful.

Carriers.

A state statute prohibiting a carrier from contracting for an exemption from the negligence of a connecting carrier when the first carrier undertakes to transport property to a point beyond its own route is held, in McCann *v.* Eddy (Mo.) 35 L. R. A. 110, to be valid, and not to amount to an unconstitutional regulation of interstate commerce.

Injury to a man while standing on a platform waiting for a train, by being struck with the body of another person who was killed and hurled against him by an incoming train, is held, in Wood *v.* Pennsylvania R. Co. (Pa.) 35 L. R. A. 199, to give no right of action against the railroad company, although the train which struck and killed the person was running at an improper rate of speed and did not give warning of its approach. The court holds that the negligence of the railroad company was not the proximate cause of the accident to the person on the platform but that the proximate cause was the negligence of the person killed.

The negligent and terrifying acts and exclamations of a brakeman on a train carrying both freight and passengers, when made in a car containing passengers, and which cause them to jump from the train, believing that a wreck is imminent, are held, in Ephland *v.* Missouri P. R. Co. (Mo.) 35 L. R. A. 107, to render the carrier liable for the injuries received in jumping, although the brakeman had no express duty to perform in or about that car.

The duty to awaken a passenger in a sleeping car in time to permit preparation for changing cars in a suitable and decent manner is affirmed in McKeon *v.* Chicago, M. & St. P. R. Co. (Wis.) 35 L. R. A. 252. The fact that there is no stipulation for this in the contract of carriage is held insufficient to relieve the carrier of the duty to awaken the passenger before reaching the station or else hold the

train long enough to permit the change of cars to be made suitably and decently.

Cemeteries.

The right of a widow to remove her husband's body from a cemetery lot owned by his daughter, in which he was buried by his own request, is denied in Thompson *v.* Deeds (Iowa) 35 L. R. A. 56, if the only reason for removal was their disagreement respecting a monument and the care of the grave. The widow is held entitled to erect a suitable monument to him on that lot, but not to place on it any reference to the daughter or her first husband, who was buried on the lot, nor to erect a coping around the lot. The court allowed both parties to decorate the grave with flowers, but recommended them to exercise a little Christian charity.

Charities.

A trust to provide education in the mechanical arts for the boys and girls of California is held, in People, *ex rel.* Ellert, *v.* Cogswell (Cal.) 35 L. R. A. 269, to be sufficiently certain and valid. The fact that trustees have abandoned or violated the trust, or that it has become impracticable, was held insufficient to extinguish the trust.

Common Law.

The adoption by statute of the common law of England as it existed prior to the fourth year of James I. is held, in Chilcott *v.* Hart (Colo.) 35 L. R. A. 41, to permit the consideration of decisions rendered after that time for the purpose of determining what the common law was.

Constitutional Law.

(See also MUNICIPAL CORPORATIONS.)

A statute prohibiting book making, pool selling, etc., with a proviso exempting those who carry on the business within the limits or inclosure of a regular race course, is held, in State *v.* Walsh (Mo.) 35 L. R. A. 231, to constitute a violation of the constitutional prohibition against any grant of special or exclusive rights, privileges, or immunities by local or special laws.

Contagious Diseases.

The exposure of a servant to a contagious or infectious disease, of which the servant is ignorant and unable to know by the exercise of ordinary care, when the master knows or ought to know the danger, and does not warn the servant, is held, in Kliegel *v.* Aitken (Wis.) 35 L. R. A. 249, to render the master liable if the servant contracts the disease.

Contracts.

A contract by a local dealer with a foreign brewing company that he will not sell or be interested in the sale of any beer except that of the company, which in turn agrees not to sell or consign beer to any other party in the vicinity, is held, in Fuqua *v.* Pabst Brewing Co. (Tex.) 35 L. R. A. 241, to make such a combination of the capital and acts of the parties as to constitute a trust in violation of the Texas statute, and the beer as soon as it is brought into the state is held to be subject to the state anti-trust law by virtue of the Act of Congress of August 8, 1890.

Criminal Law.

The dismissal of a jury in a criminal case merely because a witness is absent is held, in State *v.* Richardson (S. C.) 35 L. R. A. 238, to amount to an acquittal, which will make any subsequent attempt to prosecute the prisoner a second jeopardy.

Death.

A right of action for death allowed by statute if "no suit for damages be brought by the party injured during his or her life" is held, in Hill *v.* Pennsylvania R. Co. (Pa.) 35 L. R. A. 196, to be barred if the party injured has given a release of all demands for his personal injuries.

Dower.

The right to reach an unassigned interest in dower by a creditor's bill is denied in Harper *v.* Clayton (Md.) 35 L. R. A. 211, in the absence of any provision therefor by statute.

Evidence.

The burden of proving defendant's sanity, in a trial for murder, is held, in Ford *v.* State

(Miss.) 35 L. R. A. 117, to rest upon the state; but if there is no evidence on the subject it may be sustained by the presumption that all men are sane, while if there is evidence to rebut the presumption the proof of sanity must be made beyond a reasonable doubt.

Game Laws.

Deer roaming wildly over a private park containing between 700 and 800 acres covered mostly by woods, and surrounded on all sides by the sea, except at a narrow strip connected with the mainland across which artificial structures are placed to prevent escape, are held, in State *v.* Parker (Me.) 35 L. R. A. 279, to be within the operation of the game laws prohibiting the right to hunt and kill them in close time. The claim that the deer were reclaimed and held in such close confinement as to be exempt from the statute was rejected.

Governor.

The lieutenant governor, who acts as governor under a constitutional provision that the duties of the office shall devolve upon him in case of the governor's death, is held, in State, *ex rel.* Sadler, *v.* La Grave (Nev.) 35 L. R. A. 233, to have no right to the governor's salary, in the absence of any statutory or constitutional provision as to the salary.

Highways.

The determination of a city council that trees growing on a sidewalk are an obstruction to travel is held, in Vanderhurst *v.* Tholcke (Cal.) 35 L. R. A. 267, to be conclusive, where the charter gives the council general control of the streets, with power to define, prevent, and remove nuisances.

Husband and Wife.

The right of a married woman to subscribe to a fund for the purpose of procuring an improvement upon property in the vicinity of property which she owns is denied, in Detroit Chamber of Commerce *v.* Goodman (Mich.) 35 L. R. A. 96, although it appears that her property may be incidentally benefited by the improvement and the statutes provide that her property "may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with like effect as if she were unmarried."

Marriage in violation of a statute prohibiting a person from whom a divorce is granted to marry again within three years, unless the former spouse is dead, is held, in Ovitt *v.* Smith (Vt.) 35 L. R. A. 223, to be subject to annulment at the suit of the innocent party, where the statute not only declares that the marriage shall not be lawful, but imposes a severe penalty for violating the prohibition, although it does not expressly declare that the marriage shall be void. But for the protection of the innocent wife and children, it is held, in Crawford *v.* State (Miss.) 35 L. R. A. 224, that disobedience of a provision in a decree of divorce prohibiting the offender under penalty from marrying again during the life of the former wife will not make his subsequent marriage in another state with a woman who was ignorant of such prohibition void.

Insurance.

A statute requiring payment of the full amount of a policy on total loss is held, in Daggs *v.* Orient Ins. Co. (Mo.) 35 L. R. A. 227, to be valid; and it is further held that a foreign corporation which avails itself of the privilege of doing business in the state has no right to complain that the law is unconstitutional.

A bond insuring a foreign corporation against the dishonesty of its manager is held, in McCanna & F. Co. *v.* Citizens' Trust & S. Co. (C. C. App. 3d C.) 35 L. R. A. 236, to be void, where the corporation has not complied with the statute, which makes it a misdemeanor to do business without such compliance.

Provisions in a life insurance policy that it shall be void if the assured shall die "by his own hand" or "by his own act" are held, in Mutual Life Ins. Co. *v.* Wiswell (Kan.) 35 L. R. A. 258, to be equivalent to a proviso against suicide or intentional self-destruction.

An exchange of policies to which an insured person reluctantly agrees after a loss on assurances that it will be all right and that he will be protected, when he still insists that the original insurer is liable, is held, in Clark *v.* Insurance Co. of North America (Me.) 35 L. R. A. 276, to be insufficient to ratify the unauthorized act of the agent in attempting to transfer the risk without notice to the insured, when he did not write the new policy until after the loss.

Judgment.

A decree of divorce obtained by a wife without disclosing the fact that before she brought the suit she had appeared in a similar suit brought by her husband in another state and still pending is held, in Dunham *v.* Dunham (Ill.) 35 L. R. A. 70, to be invalid because of her fraud, although the pendency of the prior suit could not have been pleaded in abatement or in bar. It is also held that a decree granted in another state to a woman who went there solely for the divorce, with the intent of returning, is void for want of jurisdiction when service on the husband was had only by publication.

Liens.

A bridge built on a county road under a contract with the county is held, in First Nat. Bank *v.* Malheur County (Or.) 35 L. R. A. 141, to be exempt from liability to mechanics' liens because of the public character of the bridge.

Municipal Corporations.

An ordinance providing for the election of an officer by a joint convention of the two branches of a city council is held, in Hooper *v.* Creager (Md.) 35 L. R. A. 202, to be unauthorized, where the statutes provide for appointment by the mayor, with the advice and consent of a convention of the two branches of the council, and also provide that the mayor and council may pass ordinances regulating the "manner of appointing."

The power to fix the mode of procedure in the enactment of ordinances, by an ordinance which will govern so long as it is in force, is sustained, in Swindell *v.* State, *ex rel.* Maxey (Ind.) 35 L. R. A. 50, where it is held that an ordinance requiring three readings to pass any ordinance and that the third reading shall not be had on the same day in which the ordinance was introduced, unless the rule is suspended by a two-thirds vote, cannot be annulled or repealed by a mere majority vote on a motion which is not read and adopted in accordance with the provisions of such ordinance.

An ordinance prohibiting the location of a livery stable upon a street where two thirds of the buildings are residences, unless a majority of the lotowners consent in writing, is sustained in Chicago *v.* Stratton (Ill.) 35 L. R. A. 84, and it is held that this does not amount to a delegation of power to lotowners.

An ordinance that no person shall permit drunkards, gamblers, or other disorderly persons to congregate or remain in his residence or place of business, is held, in Grand Rapids *v.* Newton (Mich.) 35 L. R. A. 226, to be unreasonable and beyond the power of the council to enact because it is not limited to places which require police regulation or to assemblages of immoral persons, and does not make a knowledge of the reputation of the visitors an ingredient of the offense.

An ordinance prohibiting the maintenance of any slaughter-house within the city, if authorized by statute, is upheld, in Beiling *v.* Evansville (Ind.) 35 L. R. A. 272, against the claim that it was unreasonable, and it is said that the reasonableness cannot be questioned by the courts.

Officers.

Under a statute providing that an office shall be *ipso facto* vacant if the officer fails to file his bond within the time limited, it is held, in State, *ex rel.* Berge, *v.* Lansing (Neb.) 35 L. R. A. 124, that the provision is self-executing, and that such a vacancy can be filled without any previous judicial determination of the fact.

Partnership.

An association of persons formed for an illegal purpose, or which is against public policy, is held, in Jackson *v.* Akron Brick Asso. (Ohio) 35 L. R. A. 287, to have no right to sue in its partnership name as the statutes permit a lawful partnership to do.

Railroads.

The power of municipal authorities to remove a railroad track from a street crossing is denied in Chicago *v.* Union Stockyards & T. Co. (Ill.) 35 L. R. A. 281, even if the owner of the road had used it for unauthorized purposes and had thereby created a nuisance, as the power to abate the nuisance did not authorize the destruction of the property.

Failure of a railroad company to build fences is held, in Carper *v.* Kimball (C. C. App. 4th C.) 35 L. R. A. 135, not to render it liable for injuries to railroad employees, where the statutes required the fences only through enclosed lands outside of towns.

Other reasonable measures for public safety required by common prudence, considering the danger, locality, travel, and surrounding

circumstances, are held necessary in English v. Southern Pac. Co. (Utah) 35 L. R. A. 155, in addition to the signals required by statute.

Religious Societies.

A conveyance, for a nominal consideration, of a lot on which an Episcopal church had been erected by voluntary contributions made to an incorporated society and their successors, "but not to their assigns," with a restriction on any sale or mortgage of the premises, or the use of any building thereon except for worship and teaching in accordance with the rites of that church, was held, in Mills v. Davison (N. J.) 35 L. R. A. 113, to create a trust, and not a condition subsequent which could be enforced by forfeiture; and where the deed gave consent to a specified mortgage it was held that, on the foreclosure of this, the surplus proceeds were subject to the trust.

Voters and Elections.

Agreements by candidates and committees of opposing factions of a political party for the settlement of differences, and agreements of candidates to withdraw on a certain contingency, are held, in Sims v. Daniels (Kan.) 35 L. R. A. 146, to have no effect on the duty of officers as to the placing of candidates on official ballots, and to be improper for consideration by them. It is also held that where opposing factions of a party nominate full sets of candidates, and the nominations are certified to the county clerk as provided by statute, neither can be excluded from the official ballot.

But in California it is held, in the case of McDonald v. Hinton (Cal.) 35 L. R. A. 152, that where two or more bodies of voters claim to be a convention the true one must be determined, in the first instance at least, by the registrar to whom certificates of nomination are presented for filing, and that the mere fact that a certificate is in due form is not in itself conclusive as to his duty to file it.

Wills.

The mere steadying of the hand of a testator who is competent to make a will and who is free from undue influence is held, in Sheehan v. Kearney (Miss.) 35 L. R. A. 102, insufficient to make his signature invalid if he consciously performs the act of writing it.

Specific Performance.

Payment of interest not provided for by the contract, prior to the time of entering the decree, is held, in Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co. (Ill.) 35 L. R. A. 167, to be not necessary to a decree for specific performance in favor of a vendee in possession against the vendor, who had refused to perform after he had become able to do so and the vendee had tendered the purchase money.

New Books.

"Famous Legal Arguments." By M. C. Field. L. C. P. Co., Rochester, N. Y. $1.

"Supplement to Wiltsie on Mortgage Foreclosures." By Jas. M. Kerr. Williamson Law Book Co., Rochester, N. Y. 1 Vol. $6.50.

"Probate Reports, Annotated." Vol. 1. By Frank S. Rice. Baker, Voorhis & Co., New York. $5.50 per Vol.

"Ultra Vires." By Reuben A. Reese. T. H. Flood & Co., Chicago, Ill. 1 Vol. $4.

"Digest of Kentucky Reports." Vols. III. & IV. By J. Barbour. John P. Morton & Co., Louisville, Ky. $16.

Recent Articles in Law Journals and Reviews.

Contractual exemption from liability. 5 American Lawyer, 161.

The rights of the co-ordinate department of the government to interpret the Constitution. 5 American Lawyer, 167.

Model reports on claims. 5 American Lawyer, 170.

The examination of an abstract. 2 Kan. City Bar Monthly, 2.

The alienation and hypothecation of corporate franchises and corporate property. 55 Albany L. J. 231.

What constitutes a broker. 44 Cent. L. J. 324.

Conveyance — Expectant interest — Validity — Ancestor's assent. 44 Cent. L. J. 326.

Mr. Ellsworth's anti-cartoon Bill. 55 Albany L. J. 246.

The retroactive provisions of the new tariff act. 55 Albany L. J. 243.

Implied warranty. 44 Cent. L. J. 347.

The power of a court of equity to authorize the issue of receiver's certificates. 44 Cent. L. J. 344.

The sale of a solicitor's practice. 102 Law Times, 384.

The right to air. 102 Law Times, 433.

Right of a creditor to sue and attach before expiration of the credit. 44 Cent. L. J. 380.

Elections — Majority — Amendment to Constitution. 44 Cent. L. J. 383.

Can a murderer acquire title by his crime and keep it? 36 Am. L. Reg. & Rev. (N. S.) 225.

A plea for a statute. 36 Am. L. Reg. & Rev. (N. S.) 239.

Donatio mortis causa of one's own check. 36 Am. L. Reg. & Rev. (N. S.) 246.

The Humorous Side.

COULDN'T FOOL THE COURT.—"The distinguished counsel who argued this case before us have, I think, drawn three red herrings across the path of the court in the hope that we should be drawn off the scent," says Bowen, L. J., in L. R. 24 Ch. Div. 421.

A THOROUGHBRED BULL.—While the bulliest bulls are Irish, some John Bulls are good. An English judge sentencing a prisoner is credited by the "Law Notes" of London with this: "Are you aware that for these repeated breaches of the law it is in my power to sentence you to a term of penal servitude far exceeding your natural life? and, what is more, I feel very much inclined to do it." He doubtless knew the maxim, *Boni judicis est ampliare jurisdictionem.*

THE WAY IT USED TO BE.—"If the exceptionable conduct of either widows or widowers when they become anxious to marry is to be regarded as delusion, our lunatic asylum might have to be very much enlarged," said the court many years ago in a Tennessee case. But the court admits that "much of her conduct on the subject of courtship and beaux, such as showing the love letters of one suitor to another and boasting about her conquests and the like, was in very bad taste."

GENTLE SPURS TO SUCCESS.—Such stimulating terms as "fool," "idiot," "know-nothing," "brute," and "vile wretch," which were addressed by a wife to her husband, and her declaration that "he hadn't sense enough to know when he was insulted," were the basis of an unsuccessful claim for divorce in a Massachusetts case. The court said that though the husband was affected injuriously in his health to some extent, the wife was moved in part "by what seemed to her good motives and by a desire for his success in life."

THE TAR STUCK.—An Arkansas lawyer who hails from North Carolina recently found himself wishing, improperly of course, but very naturally, to reveal this fact to a juror who came from the same state. To do this, "The Spring River News" says, he dropped some chewing gum, stepped upon it, and pretended that his heel had stuck to the floor. This gave him an opportunity to say that he was a "tar heel" and that the warmth of the room had made the tar run. The verdict proved that the tar heels stuck together.

SIMPLIFYING ELECTIONS.—A by-law of Maidstone, England, set forth and held bad in Rex v. Cutbush, 4 Burr. 2204, recites "that the commonalty of the said town and parish were very numerous, and the admission of them to vote in the election of common councilmen of the said town and parish had been found by experience to be attended with many inconveniences, and had from time to time occasioned divers riots and disorders and great popular confusion within the said town and parish, and had very much disturbed and broken in upon the peace, good order, and government of the said town and parish; and further recited that such inconvenience would be likely to be remedied if the right of electing of the common councilmen of the said town and parish were to be confined to the mayor, jurats, and such of the commonalty of the said town and parish who then were or should be of the common council of the said town and parish for the time being and sixty others of the said commonalty who were or should be the senior common freemen for the time being of the said town and parish as they should stand in order and place of seniority upon the books of admission of freemen of the said town and parish." It is consequently ordained that every future election should be held by these persons "without the presence or concurrence of any other of the commonalty."

On a contest of this by-law it was argued that "the sixty seniors of 900 must be very old and may be necessitous or nonresident." And it is said that "in fact upon this very election only seven of the commonalty did appear, of whom four came out of the workhouse."

AS TO BRIEFS

Can you blame a judge if he relies on your brief to furnish all the cases in your favor? Through lack of time for independent search, he will overlook authorities, if not there, which would win the case. But if you have no sure guide to them, and but limited time for search may you not miss the clinching authorities?

They can be found in the notes to the Lawyers' Reports Annotated. These notes are on single isolated points—just such as come up for briefing—*e. g.*, "City liability for ice on sidewalks," 21 L. R. A. 263, "Mortgage on future crops," 23 L. R. A. 449; and *every case* on the point is examined and cited. You not only get precedents for your own briefs, but can anticipate your opponent's authorities, *for we give all.*

Is our claim too broad? We quote from the opinion of the Mississippi Supreme Court in the case of *Marshall Co.* v. *Tidmore*, 21 So. Rep. 52: "All the cases relied on by learned counsel for appellee, and others, are set out, and properly discriminated, in the note to *Robinson* v. *Chambers*, on page 57 of the twentieth volume of the Lawyers Reports Annotated, a series absolutely invaluable to Bench and Bar."

We will gladly mail you a sample part, with "Where to Look for the Law," a valuable reference book, on receipt of a postal card request.

The Lawyers' Co-operative Publishing Company
Rochester New York

IN RE

GENERAL DIGEST VOL 7

In the matter of the injunction sought to be obtained in an action begun in 1892 by the West Pub. Co. against volume 7 of the General Digest for that year, for alleged infringement of copyright, a decision has been reached in the Circuit Court of Appeals by Lacombe, J. against our contention, and the former decision of Judge Coxe of the Circuit Court.

Judge Coxe said that plaintiff contends that "a party on whom the *onus probandi* rests, is entitled to a decree for the entire relief demanded if, instead of proving his case, he proves a part and convinces the court that it would be difficult to prove the rest. * * * The court cannot believe that such a decree would be just. * * * This would be substituting conjecture for proof, and in a case too where the proof is accessible."

Judge Lacombe says: "Where by the misconduct of defendant's employes a part of complainant's copyrighted work has been appropriated by defendant and so mingled with original matter contained in its publication that no one except its own employes who did the wrong can segregate the pirated from the original matter, and they do not make such segregation, the whole work, or so much of it as is tainted by the workmanship of the unfair users, should be enjoined and accounted for."

The case is not yet finally decided.

Of the work chiefly complained of part was done by a former employe of the West Publishing Co. temporarily assisting us, and part by an employe of ours who soon after entered their service at St. Paul.

This is not in any sense "a test case." It affects only a small amount of work done five years ago. The West Pub. Co. have never dared to attack any of our later volumes, nor will they.

The Lawyers Co-Operative Publishing Co
Rochester New York

THEY DISLIKE IT

The West Publishing Company is unhappy over the commendations of the New General Digest.

"This is the most satisfactory scheme that has ever been devised" says the American Law Review in an editorial. The same recognized authority declares that "the makers of the General Digest have carried such work to a perfection never before achieved in this country." The Albany Law Journal says "The example of the Rochester house ought to be followed by the St. Paul publishers without delay." They *have* heretofore "followed the example" by copying valuable features, but the new plan they're afraid to copy, yet more afraid of its competition.

Therefore they resort to sweeping statements that the General Digest has been adjudged "piratical." For this, suit has already been brought for libel. Their copyright case, which is by no means ended, touches nothing but volume 7 of the old series, made about five years ago. Any infringing paragraphs in that volume were made either by outside temporary help, or else by a man who secretly went to the West Company's employ pending the suit. That Company has brought no suit against any of our work done since that time, it will not, and dare not; so squirming it tries to blacken the whole series.

The reason is plain; its clumsy, unwieldy aggregation, the "American" Digest, citing and made chiefly from its own unofficial reporters cannot hold its own against the new General Digest, which gives all cases as first published, in its Quarterly parts, and then in its symmetrical, handsome, permanent volume becomes a digest of official reports, but complete with *all* citations. New features of great value, fairly doubling its utility, are being added to volume 3 and will certainly give the St. Paul people still more severe perturbation.

THE LAWYERS' CO-OPERATIVE PUBLISHING CO Rochester New York

General Digest, New Series, Vols. 1 and 2, to January, 1897, are ready; price $6 each, delivered, 50 days' approval, if desired. They have Denison index. One sample Quarterly part for half price, 50 cents. Annual subscription, $4. Full descriptive circulars, commendations, etc., on application.